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JESSICA RIZZO

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The Future of NFTs Lies With the Courts

As the first cases involving NFTs hit the dockets, courts will decide questions around ownership, art, and commerce.

SUPERFARM TOUTED THE sale as “a groundbreaking landmark—both for the crypto space and the broader music industry.” The newly minted NFT of Jay-Z’s debut album *Reasonable Doubt* would, it said, “provide ownership of the album’s copyright, transferring the rights to all future revenue generated by the album from Damon Dash to the auction winner.”

The catch? Dash did not actually own the copyright to *Reasonable Doubt* (not that selling it as a non-fungible token would necessarily have worked if he did). Now he is the defendant in a federal lawsuit brought by the hip hop label Roc-A-Fella records.

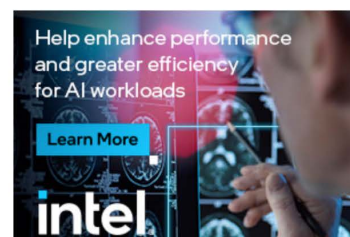
This case, filed in June 2021, was one of the first involving NFTs to hit the dockets. In another case filed a few months later, Playboy Enterprises sued the operators of a counterfeit website designed to mimic the site Playboy created to sell its “Rabbitar” NFTs. According to Playboy, the scam worked—over a thousand people mistook the fake website for the real one and collectively shelled out more than a million dollars for Rabbittars they never received.

In the coming months, courts

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are going to see an influx of NFT-related litigation. Some early NFT cases, like Dash's, will help identify places where the crypto hype machine has severed all ties with reality. Others, like the Playboy case, will hold to account a few of the many presently behaving as though the law simply disintegrates when one enters the world of Web3.

"Just because you're doing something online doesn't mean

that traditional laws don't apply to you," says Juliet Moringiello, a professor at Widener University Commonwealth Law School. "And the funny thing is, we've seen this before." Moringiello points to John Perry Barlow's 1996 "[Declaration of the Independence of Cyberspace](#)," in which the cyberlibertarian poet proclaimed that the governments of the world ("you weary giants of flesh and steel") had no sovereignty over the ethereal realm of the internet. "Your legal concepts," he wrote, "do not apply to us."

"Well," says Moringiello, "yeah, they do."

Barlow is a beloved figure among some crypto boosters. In crypto discussion forums, Redditors fondly exchange favorite quotes from his "Declaration" along with conspiracy theories about his death. They describe him as being "ahead of his time."



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"It's unfortunate," says Erika Douglas, a professor at the Temple University Beasley School of Law who teaches a course on the regulation of emerging technologies. "It gives these early technologies a bad rap, because some of these forays are so dismissive of the law."

Because the law relies heavily on precedent, early judicial opinions in the coming wave of NFT-related litigation will have an outsize impact. Very soon, a judge is going to have to answer some foundational questions about the legal status of NFTs that will have major consequences for art and commerce in the metaverse.

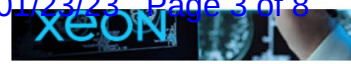
"THE OBVIOUS [QUESTION]," says Christopher Odinet, a professor at the University of Iowa College of Law, "is if you have an NFT, what do you really have? Do you just have a contract right? Do you have a license right? And how do you make that decision?" While a license is a species of contract, the difference matters. A contract would be the favored mechanism for transferring ownership, but a license is merely a limited grant of permission to use something owned by someone else.

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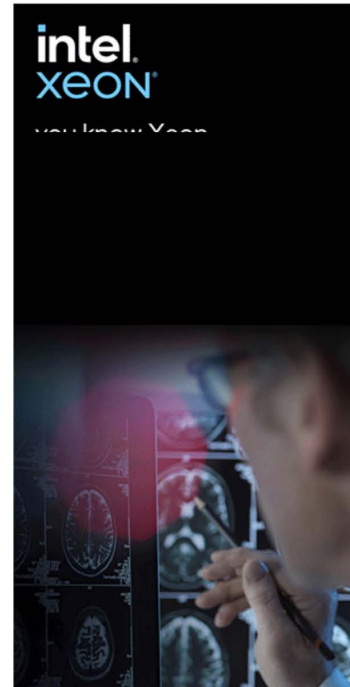
A court could try to answer this question by enforcing a given NFT platform's terms of service, which vary widely with respect to the kinds of rights they purport to confer, but a court could also throw those terms out the window if it found them to be incoherent. Odinet and Moringiello, who study [the property law of tokens](#), say that many of the terms of service on such platforms are. For example, when a platform reserves the right to shut down a user's account or deny a user access to their NFTs, as many do, that would seem to conflict with the idea that users have any meaningful rights to these assets at all.

A court would also decline to enforce an NFT platform's terms of service if they violated established law. I could write a contract promising to give you my right arm in exchange for your rent-controlled Greenwich Village apartment, but no court would compel me to abide by such an agreement. Nor could I successfully contract around the fundamental precepts of property law by, say, asserting that an NFT somehow embodies property rights in a JPG file. Though this claim is carelessly thrown around all the time, it is unlikely to ever be endorsed by a court, which is why those who continue to be outraged when images associated with their NFTs are "right-click saved" have no legal recourse unless they own the underlying copyright.

Courts adjudicating these novel issues may soon be able to seek guidance from the Uniform Commercial Code, which governs commercial transactions in all 50 states. Moringiello is vice chair of the committee currently amending the UCC to provide a framework for transactions involving "controllable electronic records," a proposed new category of property that would include cryptocurrency and NFTs. The current draft amendments confer property status on NFTs and grant some certainty to loans secured by NFTs, but make clear that ownership of the token does not necessarily translate into ownership of the files associated with the tokens. Your legal relationship to the image or music file associated with the NFT will continue to be nothing more than a poetic metaphor (not that there's anything wrong with poetic metaphors, so long as you understand that's what you're getting).

Meanwhile, the class action *Friel v. Dapper Labs* is calling attention to the plight of the crypto-curious who don't understand what they're getting. The case suggests a gap in the regulation of securities, a class of tradable financial instrument that includes stocks and bonds. An issuer making a public offering of securities is required to comply with a variety of disclosure requirements to deter fraud and help investors assess risk. The plaintiffs in this case are suing Dapper Labs for selling NBA Top Shot "Moments," NFTs associated with video clips of highlights from NBA games. The plaintiffs, all of whom purchased Moments, argue that the NFTs are unregistered securities.

Because Dapper Labs failed to comply with the securities disclosure requirements, the plaintiffs allege, thousands of buyers sank money into the Top Shot marketplace and were flummoxed when they discovered that most of them would not be getting rich quick and that in fact they would have to wait months to cash out. "These aren't bubble gum cards," says the plaintiffs' attorney Phillip Kim. "People are viewing these things as investments and throwing down hundreds of thousands of dollars."



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If the court determines that the Moments NFTs are securities, Dapper Labs will have to either go through the registration process or verify that the purchasers were “accredited investors,” meaning investors deemed wealthy and savvy enough to participate in risky financial enterprises without the ordinary guardrails.

A verdict against Dapper Labs would be a win for the legions of retail investors—an alarming proportion of whom are working-class people of color—pouring money they cannot afford to lose into Moments and similar crypto assets. “One court case is not necessarily going to be decisive,” cautions Jill Fisch, a professor at the University of Pennsylvania Carey Law School. “NFTs vary,” she says, “and the extent to which they’re securities is going to vary from one case to another.” But while a loss for Dapper Labs would not mean that all NFT sales were suddenly subject to federal securities regulations, it would put other sellers on notice that they might be, which could protect consumers by curbing some of the misleading marketing that continues to make investing in crypto so perilous for the uninitiated.









And while consumer protection and innovation are often represented as competing values, Douglas sees that framing as creating a false dichotomy. “Good regulation and good law enforcement,” she says, “are positive for those who are in the space because they’re doing something that’s useful to the world.” She sees some of the consumer protection issues emerging in crypto as “ripe for Federal Trade Commission intervention.” Regulating qualifying NFT offerings as securities may be another way to promote transparency and make charlatans and scam artists hesitate before pitching their NFT collections to the public as investment schemes.

OTHER EARLY NFT cases may indirectly influence the way parties negotiate intellectual property agreements. In *Miramax v. Tarantino*, for example, the studio is suing the *Pulp Fiction* director for announcing plans to auction off NFTs associated with digital scans of the original handwritten pages of his screenplay for the 1994 cult classic. The sale, Miramax claims, would infringe the studio’s copyright.

Back when the contracts were being drawn up, of course, it never would have occurred to anyone to take into account who retained the right to mint and sell NFTs associated with *Pulp Fiction*. Tarantino granted Miramax “all rights” to the film except a handful of specifically reserved rights. These reserved rights included, critically for the lawsuit, the right of screenplay publication. Miramax argues that “the proposed sale of a few original script pages ... as an NFT is a one-time transaction, which does not constitute publication.” This is a perverse interpretation of the word “publication,” and the court should rule in Tarantino’s favor on this point. In his answer to Miramax, Tarantino argues that the studio is using “the concept of NFTs to confuse the public and mislead this Court in an effort to deny artists such as Tarantino their hard earned and long-standing rights.” He has a point. In this case, NFTs are largely a distraction.



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But another important clause in the contract offers a more general lesson for artists and their attorneys. Miramax says it controls the right to sell NFTs associated with excerpts of the screenplay because the 1993 contract granted the studio the right to distribute *Pulp Fiction* “in all media now or hereafter known.” The contract used no such forward-looking language in assigning Tarantino his more limited reserved rights. If Tarantino had no screenplay publication provision to fall back on, this clause might have sunk his case. Artists who care about retaining the right to use crypto to derive alternative sources of revenue from their intellectual property will want to specifically negotiate for it going forward.



While *Miramax* will come down to contract interpretation, *Hermès v. Rothschild* may provide an early indication of whether corporate interests will outweigh the value of artistic expression in the metaverse. The luxury design house is suing artist Mason Rothschild for selling a series of “MetaBirkin” NFTs. According to Hermès, the MetaBirkins consist of “blurry images of ... the famous Birkin handbag,” the least expensive of which retails for about \$10,000. Having these images circulating in the metaverse will confuse consumers and dilute the brand, Hermès alleges.

Rothschild counters that the MetaBirkins are not blurry, but furry. The artist’s images are “made with pixels, but the bags are depicted as fur-covered,” a visual critique of the animal cruelty involved in making a Birkin, he contends in his answer to Hermès. In contrast to the designer bags, “which are made from the tanned hides of slaughtered animals,” Rothschild says, the MetaBirkins are not handbags; “they carry nothing but meaning.”

Comparing the MetaBirkins to Andy Warhol’s depictions of Campbell’s Soup cans, Rothschild situates himself in an established tradition of artists who have taken up iconic brands as their subject matter. The fact that his images are associated with NFTs makes no legal difference, he says. What matters is that the First Amendment guarantees his “right to respond in the marketplace of ideas to the inescapable corporate brand messages by which we are bombarded every day, virtually everywhere we look.”

Unlike Playboy, Hermès does not sell NFTs, so its claims of unfair competition are rather speculative. If the court were to determine that the brand’s monopoly extends to images like Rothschild’s, it would be major loss for artists and all who value freedom of expression, a signal that the metaverse is likely to be treated less as a new frontier for human creativity and more as an annex-in-waiting for established business concerns.

The outcomes of these early cases will have ripple effects that extend far beyond the parties themselves. On March 9, President Biden published an executive order on “[Ensuring Responsible Development of Digital Assets](#),” which directs key federal agencies to coordinate and assess the field’s challenges and opportunities. As the claims of crypto enthusiasts begin to be tested in court, regulators and legislators will be watching, waiting, and getting ideas of their own for how the law needs to change to accommodate crypto.

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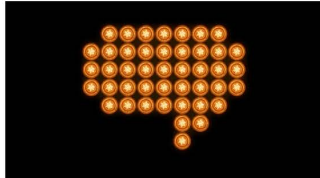
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[Jessica Rizzo](#) is an attorney with the law firm Montgomery McCracken Walker & Rhoads. She writes about art, technology, and the law.

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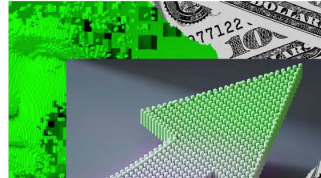
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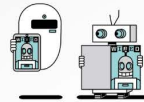
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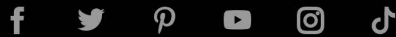
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